IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0005 OF 2007S
(High Court Civil Action No. HBJ 23 of 2006S)

BETWEEN: PUBLIC SERVICE COMMISSION

Appellant

AND: BRIAN SINGH

First Respondent

AND: PUBLIC SERVICE APPEALS BOARD

Second Respondent

Coram: Pathik, JA
Hickie, JA
Powell, JA

Hearing: Thursday 23rd October 2008, Suva

Counsel: S. Sharma]
K. Singh] for the Appellant

S. Sharma for the First Respondent
K. Muaror for the Second Respondent

Date of Judgment: Monday, 3rd November 2008, Suva at [2:15 pm]

JUDGMENT OF THE COURT

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[1] The first respondent ("Mr Singh") was the Chief Executive Officer Labour Industrial Relations and Productivity and had been since December 2003. His appointment was by contract.

[2] In July 2004 nineteen disciplinary charges were laid against him by the appellant, the Public Service Commission ("PSC"). The charges arose out of his official travel overseas. On a number of visits Mr Singh booked business but travelled economy and the difference was not refunded to the State.

[3] Those charges were heard on 30 November 2004, Mr Singh was found guilty and his contract terminated.

[4] Mr Singh appealed to the Public Service Appeals Board (PSAB) which, on 23 March 2006, reversed the PSC decision on the ground that disciplinary proceedings had not been instituted against him in accordance with clause 12.6 of his contract of employment which clause required the PSC to appoint a person or group of persons to investigate the allegations before the charges were laid.

[5] The PSC sought leave for judicial review of the PSAB decision and one of the remedies it sought was an order for certiorari to quash the PSAB decision of 23 March 2006. The application was filed on 29 June 2006.

Order 53, Rules 3 and 4

[6] Order 53 Rule 3(1) of the High Court Rules provides:

> *"No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule."*

[7] Order 53 Rule 4(1) of the High Court Rules provides:

> *"Subject to the provisions of this rule, where in any case the Court considers there has been undue delay in making an application for judicial review or, in a case to which paragraph 2 applies, the application for leave under rule 3 is made after the relevant period has expired, the Court may refuse to grant –*

(a) Leave for the making of the application;

(b) Any relief sought on the application,

if, in the opinion of the court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

[8] Order 53 Rule 4(2) of the High Court Rules provides:

> *"In the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceedings for the purpose of quashing it, the relevant period for the purpose of paragraph (1) is three months after the date of the proceeding."*

[9] Order 53 Rule 4(3) of the High Court Rules provides:

> *"Paragraph (1) is without prejudice to any statutory provisions which has the effect of limiting the time within which an application for judicial review may be made."*

The Trial Judge's Findings

[10] Singh J held that under Rule 4 the time for making an application for certiorari on the face of it ran out on 23 June 2006 but noted that on the evidence it was likely that the PSC did not get notice of the decision until after 5 pm on 28 March 2006 when a copy was faxed to it by Mr Singh's lawyers. Accordingly it was possible that the application was within the time specified in Rule 4(2) when account was taken of Order 3 Rule 2(2) which provides that *"where an act is required to be done within a specified period after or from a specific date, the period begins immediately after that date."*

[11] The trial judge, following ***R (Anufrijeva) v Secretary of State for Home Department*** [2004] 1AC 604, found that the specified date was the date when notice of the decision was given to the applicant and not the date of the decision, and that

accordingly the 3 months ran from 29 March 2006 and that the application was in time.

[12] However the trial judge held that even if an application is made within the three month period it may still be considered that there was undue delay. The trial judge relied on ***R v Herrod, Ex-parte Leeds Council*** [1976] 1 QB 540 at 575A.

[13] The trial judge found that the PSAB ought not to have allowed Mr Singh's appeal because an investigation into Mr Singh's conduct had been carried out by the Ministry of Finance (albeit not requested by the PSC) and a report delivered to the PSC. It would have been a useless exercise for the PSC to conduct a further investigation. However the trial judge found that the PSC had been guilty of unreasonable delay in bringing the judicial review proceedings and he dismissed the PSC's application for leave with costs.

Leave to the Court of Appeal

[14] Section 12(2)(e) of the Court of Appeal Act provides that in civil cases no appeal shall lie without the leave of the judge or of the Court of Appeal from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, except in certain specified cases.

[15] This Court held in ***Vinod Raj Goundar v Minister of Health*** [2008] ABU0075 of 2006S that a decision by the High Court to grant or refuse leave, whether leave for judicial review or otherwise, is an interlocutory decision and therefore any appeal to the Court of Appeal from such decision requires the leave of the Court of Appeal.

[16] The appellant sought leave in Court and was granted leave on the grounds that when the appeal was commenced he was entitled to take the view, relying on the earlier authority that leave was not required.

Was The Leave Application within the 3 month period specified in Order 53 Rule 4(2) ?

[17] The respondents contended that Singh J erred in holding that time under Order 53 Rule 4(2) ran from the date the relevant party received notice of the decision. The contention was that it ran from the date of the decision, in this case 23 March 2006.

[18] In support of this construction the respondents rely on Order 55 Rule 4 which, dealing with appeals to the High Court, provides in sub-rule (2) that a notice of appeal must be served, within 28 days after *""the date of judgment, order determination or other decision against which the appeal is brought"* but goes on in sub-rule (4) to say that in the case of an appeal from an order, determination, award or other decision of a tribunal, Minister of State, government department or other person, *"the period specified in paragraph (2) shall be calculated from the date on which notice of the decision ..... was given to the appellant"*.

[19] The submission was that if time under Order 53 Rule 4 ran from the date notice of the decision was given then it would have said so in the terms order 55 Rule 4(4) says so.

[20] However it could equally be said that if time under Order 53 Rule 4 ran from the date of the decision it would have said so in the terms order 55 Rule 4(2) says so.

[21] Either construction is arguable and there may be practical reasons for adopting the construction of the trial judge however in ***Harikisun Limited v Dip Singh & Ors*** [1996] Civil Appeal 19 of 1995, the Court of Appeal of Fiji held that the three month period under Order 53 Rule 4(2) runs from the date of the decision and not from the date when the appellant was made aware of the decision.

[22] There are practical reasons in support of this view as well, for example all parties know when the time for a leave application expires or has expired. However more importantly the decision in ***Harikisun*** was binding on the trial judge and ought to have been applied.

[23] The appellant says that ***Harikisun*** should be overruled, and ***Anufrijeva*** followed. In ***Anufrijeva*** the House of Lords held:

> *"Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system..*
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> ...
>
> *This view is reinforced by the constitutional principle requiring the rule of law to be observed. That principle too requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected."*

[24] As a rule of fundamental principle a court ought not overrule itself unless there are compelling grounds for dong so. There are compelling reasons for doing so in this case, namely:

- The Constitutional principle enunciated in ***Anufrijeva.***
- The desirability of the common law of Fiji being in accord with the common law of England and other common law jurisdictions.
- The fact that the matter was not fully argued in ***Harikisun,*** where both counsel accepted that the period ran from the date of the decision and

where the Court concluded that this was "correct" without undertaking any analysis.

- The PSAB and many other administrative tribunals, unlike Courts, don't always give prior notice of the delivery of their decision to the parties.

[25] ***Harikisun***, on this point alone, is overruled. Accordingly the application for leave for judicial review was within the 3 month period limited by the Rules.

Can there be undue delay in bringing an application for leave for judicial review when the application is brought within the period specified in Order 53 Rule 4(2) ?

[26] The trial judge held that there had been unexplained undue delay in bringing the application for leave for judicial review notwithstanding his finding that it was within the 3 month period specified in the High Court Rules. The trial judge was critical of the appellant for writing to the respondent on 12 May 2006 noting that it had decided to challenge the PSAB ruling by way of judicial review and stating that *"this would hopefully be expeditious in the spirit of the High Court review jurisdiction."*

[27] Thereafter, the trial judge found, the appellant went into *"hibernation"*. The trial judge found that *"substantial prejudice has resulted by the casual manner in which the PSC adopted in filing this application. It has given no explanation for the delay."*

[28] The trial judge relied on ***R v Herrod, Ex-parte Leeds Council*** [1976] 1 QB 540 at 575A and other English authority for the proposition that *"If there has been unreasonable delay, then even though the application for leave is made within the six months, resulting hardship to an opposing party may well be a reason for refusing the order sought."*

[29] In ***R v Ashton University Senate: Ex-parte Roffey*** [1969] 2 QB 538 Donaldson J stated:

> *"The prerogative remedies are exceptional in their nature and should not be made available to those who sleep upon their rights."*

[30] The appellant sought to distinguish the English cases on the basis that the English Order 53 Rule 4(1) is in different terms. It reads, relevantly:

> *"An application for leave to apply for judicial review shall be made* ***promptly*** *(emphasis added) and in any event within three months from the date when grounds for the application first arose..."*

The absence of the word *"promptly"* in the Fijian version of the Rule is, it was submitted, significant.

[31] In ***Maisamoa v Chief Executive Officer for Health & Ors*** [2008] Fiji Court of Appeal Civil Appeal ABU0080 of 2007S the Court, held at para 18:

> *"One of the features of judicial review as a remedy is that it must be instituted promptly. Indeed Order 53 Rule 4 makes that plain from the language of the rule which requires that applications for leave must be made promptly and in any event within three months from the date when the grounds for the application first arose."*

Something similar was said at paragraph 7 of the judgment.

[32] In ***Maisamoa*** the Court was dealing with an application that was well outside the three month period and what was said about the language of Order 53 Rule 4 was strictly obiter. However a close analysis of Order 53 Rule 4(1) bears out the construction ***Maisamoa*** put on it.

[33] The relevant part of the Rule is disjunctive. It says in effect that the Court may refuse to grant either leave for judicial review **or** judicial review if the Court

considers that there has been undue delay **or** the application is made after the relevant period has expired.

[34] Accordingly the position in Fiji is as in England and as was stated in ***Maisamoa*** namely that judicial review proceedings, including proceedings for leave, must be issued without undue delay and in any event within the time limited by the Rules.

[35] The position in England, however, is that leave *"should only be refused in clear cases of unjustifiable delay"*: ***Harikisun*** [at page 9].

[36] It may have been open to the trial judge to find that the delay in this case was unjustifiable but ***Harikisun*** is also authority for the proposition, approving ***Caswell v Dairy Produce Quota Tribunal for England and Wales*** [1990] 2 AC 738, that *"questions of delay are best dealt with in depth at the substantive hearing."*

[37] However as the Court of Appeal in ***Beni Naiveli v The State and Anor*** [2002] Civil Appeal ABU0059 of 1999 observed, it is impermissible for a judge hearing the leave application to proceed to determine the substantive matter on the same occasion. Once the trial judge determines that there is an arguable case then, subject to refusing leave on discretionary grounds, leave is granted and the parties are given *"a tight timetable towards a substantive hearing."*

[38] Noting also that the Court in ***Harikisun*** held that "undue delay" in Rule 4 meant *"excessive, extreme, unjustifiable or going beyond what is appropriate"*, it logically follows that an application for leave for judicial review that is within the time limited by the Rules, should only be refused on grounds of delay alone in an exceptional case. That the parties were unable to refer the Court to any case in Fiji where this had been done, bears this out.

[39] The trial judge was entitled to conclude that this was an exceptional case taking into account the sixteen months delay between the termination of the respondent by the PSC and the PSAB determining his appeal, and, in light of that delay, the failure of the appellant to make the leave application until the very last day permitted by the Rules, notwithstanding that the appellant had decided to seek leave six weeks earlier, on 12 May 2007.

[40] In any event it is for the trial judge in the exercise of his discretion to determine whether it is an exceptional case and an appellate Court cannot interfere with such a determination unless it can be demonstrated that some error has been made in that determination, such as allowing extraneous or irrelevant matters to guide or affect him or if he mistakes the facts: ***House v The King*** [1936] 55 CLR 499.

[41] The appellant also relies on ***Maisamoa*** where the Court confirmed that a good reason for a Court to extending time to bring a judicial review application includes the importance of the point of law at stake.

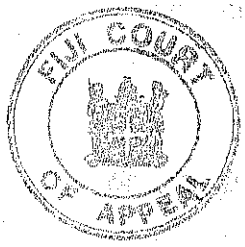
[42] The appellant contends that the construction of clause 12 of the contract is an important point of law. This seems unlikely but even if it can be characterised as an important issue of law the trial judge has disavowed the PSAB's construction of the clause and future PSABs would be bound by the trial judge's view.

[43] The orders of the Court are:

(1) Appeal dismissed.

(2) The appellant to pay the respondent's costs as taxed or as agreed.

Pathik, JA



Hickie, JA

Powell, JA

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